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HUGO MARTIN RECINOS-RECINOS, *et al.*)  
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PLAINTIFFS,) )  
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EXPRESS FORESTRY, *et al.*)  
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DEFENDANTS.)

Case No. C06-307-MAT  
  
PLAINTIFFS' MOTION TO  
ENFORCE COMPLIANCE BY  
PLUMCREEKTIMBER  
COMPANY, INC. WITH  
SUBPOENA DUCES TECUM  
  
NOTE ON MOTION  
CALENDAR:  
FRIDAY MARCH 10, 2006

Third party Plum Creek Timber Company, Inc. (hereinafter “Plum Creek”) objects to Plaintiffs’ documentary subpoena. Plum Creek’s objections are unwarranted and do not justify non-compliance with the subpoena *duces tecum* served by Plaintiffs.

As set forth fully in Plaintiffs' initial briefing, the information sought by the subpoenas is plainly relevant to underlying litigation against Defendants Express Forestry, Rick Thomas, and Sandy Thomas (hereinafter "Defendants"). Pl. Mot. to Enforce Subpoena 4-8. Wages due, work

1 performed and hours worked by migrant agricultural workers are the central issues of dispute in  
2 that litigation. See Ex. 1. As Plum Creek acknowledges, this work occurred on lands they owned  
3 or controlled. Plum Creek Opp. at 6.

4 Documents showing the location, timing, and type of work performed on Plum Creek's  
5 land are directly relevant to determining the lawful prevailing wage due to Plaintiff class  
6 members. Pl. Mot. to Enforce Subpoena 5-6; see also U.S. Department of Labor Employment &  
7 Training Administration, *Foreign Labor Certification Data Center*, [www.flcdatacenter.com](http://www.flcdatacenter.com).  
8 Without specific information concerning where Plaintiffs worked, what kind of work they did  
9 and when such work was performed, there is no way to determine the prevailing wage they  
10 should have been paid. Plaintiffs have successfully discovered this information from Defendants'  
11 other timber company customers. Such information is typically contained in planting contracts  
12 and other written agreements between timber companies like Plum Creek and contractors like the  
13 Defendants. See Ex. 9 (timber company contracts discussing work to be performed by Express  
14 Forestry and locations). For this reason, Plaintiffs' subpoena of these and other documents  
15 evidencing location, dates, and type of work performed is tailored to seek relevant information.

16 Plaintiffs' allegations that the Defendants' records of hours worked are false and  
17 inaccurate is at the heart of the underlying case. Ex. 1 at 8-15. It is for precisely this reason that  
18 Plum Creek's offer to forward to Plaintiffs the payroll documents Express Forestry provided to  
19 Plum Creek pursuant to 29 U.S.C. § 1821(d-e) is, by itself, inadequate. Rather, the Plaintiffs seek  
20 to probe the validity of these records of "officially reported" hours by checking records produced  
21 by Defendants against those of independent sources other than Defendants. The start and stop

1 times of work and the duration of interruptions in the work day are hotly disputed in this case.  
2 Timber company documents such as inspection reports or summaries often record the dates and  
3 times at which a particular timber company inspector was in the field with a particular crew, or  
4 the times during which particular work took place. See, e.g., Ex. 10 (inspection reports filled out  
5 by Weyerhaeuser inspector showing field location, crewleader name, and time of herbicide  
6 application). Plaintiffs thus look to inspection and summary documents produced by Defendants'  
7 customers, like Plum Creek, as a source of neutral information to corroborate Plaintiffs' accounts  
8 of their work hours, to impeach the Defendants' records of hours worked, and to identify which  
9 crews were working at which locations on what days during a given time period.

10 In addition, Plaintiffs assert that they should have been paid for time spent performing  
11 various preparation or clean-up tasks. Plaintiffs' subpoenas to other timber companies have  
12 unearthed documents which show that, under the terms of their contracts with timber companies  
13 like Plum Creek, Defendants' crews had to pick up tree seedlings at coolers before the planting  
14 day began, return leftover trees to the coolers, and dispose of trash at the end of the workday.  
15 See, e.g., Ex. 9. Such evidence is corroborative of Plaintiffs' claims that preliminary and  
16 postliminary work lengthened their compensable workday.

17 Plum Creek's assertion that the per-acre pricing information contained in such contracts  
18 is irrelevant to this wage litigation is incorrect. Plum Creek Opp. 8. Express' company policy  
19 indicates that crew supervisors' bonus pay was tied to achievement of the profit margin written  
20 into their contracts with customers like Plum Creek. See, e.g., Ex. 11 (Express Forestry  
21 Company Policy for Foreman, p. 1-2 ("Your record will be examined for profitability and

1 production. The acres or miles you covered and passed inspection are listed and then adjusted by  
2 the expenses used to run your crew. All [costs] are considered when figuring any bonus. You  
3 must keep expenses low to keep pay high.”) Express’ pay system thus created strong incentives  
4 for crew leaders to underreport hours in order to ensure that the Express profited from its  
5 contracts. As such, the Plaintiffs are entitled to explore the correspondence between contract  
6 rates and reported work hours for correlations that would indicate systematic underreporting of  
7 employee hours in order to increase Express Forestry’s profit margin.

8 Contrary to Plum Creek’s assertion, Plaintiffs do not argue that their subpoena is valid  
9 because “everybody else is doing it”. Plum Creek Opp. at 4. Rather, the fact that compliance  
10 with identically phrased subpoenas issued to similarly situated companies has produced  
11 important, admissible evidence indicates that the Plaintiffs’ subpoena is properly calculated to  
12 lead to the discovery of admissible evidence. Fed. R. Civ. P. 26 (b)(1).

13 **II. Plum Creek is Likely the Only Source for Many of the Documents Sought by**  
14 **Plaintiffs’ Subpoena**  
15

16 Plaintiffs’ efforts at traditional discovery in this case were dealt a serious blow when  
17 Defendants informed Plaintiffs that virtually all relevant documents sought by Plaintiffs’  
18 requests for production had been stored in Defendants’ Mississippi beach home in August 2005  
19 and were destroyed by Hurricane Katrina. Ex. 12 (Defendants’ Responses to Plaintiffs’ Second  
20 Interrogatories, p. 2-3). Accordingly, Plum Creek is likely the only source of documents that  
21 pertain to work performed by Express Forestry crews in satisfaction of Plum Creek contracts.

22 Thanks to other timber companies’ cooperation with identical subpoenas, Plaintiffs can  
23 piece together some fragments of the record that underlies Defendants’ accounts of hours

1 worked. See, e.g., Ex. 14 (Express Forestry daily and weekly crew sheets, produced by  
2 Weyerhaeuser pursuant to an identical subpoena). The Express-related documents produced by  
3 other timber companies have enabled Plaintiffs to determine how Defendants recorded hours and  
4 production, to understand the inaccuracies in these records, and to conduct more meaningful  
5 depositions of Defendants' supervisors.

6 Plaintiffs have taken extraordinary steps to unearth all relevant documentation and  
7 information available despite Hurricane Katrina. See, e.g., Ex 13 (Order of Magistrate Judge  
8 Knowles, February 16, 2006, ordering Defendants to allow Plaintiffs' expert access to their  
9 computer system for extraction of documents). Defendants have persistently maintained, over  
10 several months of litigation, that most documents related to Plaintiffs' work, such as weekly and  
11 daily planting summaries, were completely destroyed by Hurricane Katrina. See Ex. 12, at 2-3.  
12 Because Defendants are unable to produce broad categories of relevant documents, it is vital that  
13 Plaintiffs be provided the relevant records possessed by Plum Creek.

14 **III. Plum Creek's Novel Invocation of *Res Judicata* is Unsupported by Case Law**  
15

16 Plum Creek also claims that the rights of the Plaintiffs in this action have been  
17 compromised by a completely distinct action, brought by different Plaintiffs (employed by  
18 different labor contractors) against different Defendants, in a different Court in the year 2000.  
19 Plum Creek Opp.3, 6, 8, 11-12; See also Plum Creek Ex.B at 2-4; Ex.C at 3-4; Ex. E at 3. The  
20 lynchpin of this theory seems to be that one of the four lawyers appearing on behalf of the  
21 Plaintiffs in the instant case represented other Hispanic migrant workers in a 2000 case against  
22 Georgia-Pacific, some of whose lands Plum Creek eventually acquired. Ids. Plum Creek's

1 creative theory is utterly unsupported by law. Plum Creek's attempt to bully these Plaintiffs  
2 (who performed most of their work after the issuance of the Georgia-Pacific decision) into  
3 executing waivers of claims in exchange for Plum Creek's basic compliance with the mandates  
4 of Rule 45 is at once absurd and abusive. See Plum Creek Ex. E at 3 ("We would be willing to  
5 discuss with you some arrangement in which you would recognize the preclusive effect of this  
6 Order [Lizarraga-Ruiz v. Georgia-Pacific] and ensure that our client would not be subjected to  
7 litigation over these or related matters, if that would assist in helping us reach an agreement over  
8 these subpoenas.")

9 Moreover, Plum Creek willfully misreads the holding of the Lizarraga-Ruiz decision to  
10 indicate that "prior litigation shows that Plum Creek's actions are not relevant to an action such  
11 as the one Plaintiffs' counsel brought against a contractor such as Express" is unjustified. Plum  
12 Creek Opp. 8.; Plum Creek Ex. A at 28. To the contrary, the Lizarraga-Ruiz Court recognized  
13 that timber company representatives are often present to observe tree planting work. Plum Creek  
14 Ex. A at 18-19. In this case, Plum Creek personnel were the lone neutral third party witnesses to  
15 the work Plaintiffs performed on their land. The records sought by Plaintiffs' subpoena are  
16 patently relevant to Plaintiffs' claims arising from work performed on Plum Creek's land.

### 17 CONCLUSION

18 For the foregoing reasons, Plaintiffs respectfully request that this Court enter an order  
19 requiring Plum Creek to comply with their subpoena *duces tecum*.

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21 Respectfully Submitted,

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1 CERTIFICATE OF SERVICE

2  
3 I HEREBY CERTIFY that on this 10<sup>th</sup> day of March, 2006, a true and correct copy of the  
4 foregoing document has been served on the following counsel via FAX and 1<sup>st</sup> Class U.S. Mail,  
5 postage prepaid.  
6


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